No. 83-990

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS; PHILLIP RUNKEL, Superintendent of Public Instruction of the State of Michigan; STATE BOARD OF EDUCATION OF THE STATE OF MICHIGAN; LOREN E. MONROE, State Treasurer of the State of Michigan; IRMA GARCIA-AGUILAR and SIMON AGUILAR, BRUCE and LINDA BYLSMA, ROBERT and PENELOPE COMER, CLARENCE and ROSALEE COVERT, SCIPUO and JANICE FLOWERS, JOHN and SHIRLEY LEESTMA,

Petitioners,

-vs-

PHYLLIS BALL; KATHERINE PIEPER; GILBERT DAVIS; PATRICIA DAVIS; FREDERICK L. SCHWASS and WALTER BERGMAN,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

I.

Whether it constitutes a *per se* violation of the establishment clause to provide secular, supplementary, nonsubstitutionary instructional services to part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control.

II.

Whether the Court of Appeals' majority ruling upholding respondents' state taxpayer standing is inconsistent with this Court's decisions where, as here, respondents challenge the decisions of the executive branch of state government and of the school district, and do not challenge the constitutionality of a legislative appropriation.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Constitutional Provisions **Page**

Statutes

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JOINT BRIEF FOR PETITIONERS

OPINIONS AND ORDERS OF THE COURTS BELOW

The September 23, 1983, Opinion of the Court of Appeals, 718 F2d 1389 (1a), and the Notice of Entry of Judgment (64a), along with the August 16, 1982, Opinion and Judgment of the

District Court, 546 F Supp 1071 (65a), are in the Appendix to the Petition for a Writ of Certiorari.[1]

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1983. The petition for certiorari was filed on December 15, 1983, and was granted on February 27, 1984. The Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1966).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, amendment I — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, article III, section 2, clause 1 — "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Counsuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens

[1]

Hereafter, references to the Appendix to the Petition for Writ of Certiorari will be indicated by page numbers enclosed in parentheses (1a) and references to the Joint Appendix will be indicated by J.A. followed by page numbers, enclosed in parentheses (J.A.1).

of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT OF THE CASE

I. The Course of Proceedings and Disposition Below.

On August 7, 1980, respondents[2] filed this lawsuit in the United States District Court for the Western District of Michigan, challenging the provision of Shared Time and Community Education educational services on premises leased from religiously-oriented nonpublic schools in the Grand Rapids community. Respondents claimed that such programming violated the establishment clause.

Following the intervention of a representative group of parents with children participating in the programs, an 8-day nonjury trial was conducted before Judge Gibson in May of 1982.[3] After the close of proofs, but before a decision on the merits, Judge Gibson recused himself and the matter was reassigned to Judge Enslen who proceeded to decide the case on the basis of the transcript testimony and other documentary evidence which had been submitted to Judge Gibson.

[2]

Six individuals (i.e., taxpayers) and Americans United for Separation of Church and State filed the instant action. After the trial on the merits, the institutional plaintiff was dismissed for lack of standing. (J.A. 37).

[3]

By stipulation, respondents eliminated any claim regarding the provision of Title I (now found at 20 U.S.C.A. §2701 *et seq* (West Supp. 1983)) programming in area nonpublic schools by the GRPS. (J.A. 30, 31).

Judge Enslen issued his Memorandum Opinion (65a) on August 16, 1982, concluding that the services at issue violated the establishment clause. On that same date, the Court issued an injunctive order permanently enjoining the petitioners "from continuing to operate" such programs.[4] (123a).

On August 19, 1982, the Grand Rapids Public Schools (hereinafter GRPS), state respondents and intervenors, filed their respective appeals with the United States Court of Appeals for the Sixth Circuit. [5] On September 23, 1983, the Court of Appeals, in a 2 to 1 decision, upheld the District Court's conclusion that the GRPS Shared Time and Community Education programs violated the establishment clause. This Court granted the petition for a writ of certiorari on February 27, 1984.[6]

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[4]

Not all of the nonfederally funded, leased premises programming conducted by the GRPS was enjoined by Judge Enslen's August 16 ruling. At the conclusion of respondents' proofs, the trial court granted petitioner GRPS's Rule 41(b) motion, thus sustaining the Drownproofing, Outdoor Education, and Driver's Education programs, each of which involved *some* instruction in the nonpublic schools. (J.A. 38).

[5]

Pending those appeals, petitioners attempted unsuccessfully to obtain a stay of the trial court's ruling from the District Court, the Sixth Circuit Court of Appeals, and the Circuit Justice.

[6]

On March 7, 1984, after this Court had granted certiorari, the Michigan State Board of Education, by a 5-2 vote, opined that the instant programs violated the Michigan and the United States constitutions, and asked that it be withdrawn as a petitioner. It is not the function of this lay board, Mich. Const. art 8, §3, to render legal opinions. The responsibility for determining the legal position of the state of Michigan is reposed in the Attorney General of Michigan. Mich. Const. art 5, §21. *See generally Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977), *noted in Personnel Administrator v. Feeney*, 442 U.S. 256, 260 n.5 (1979). Moreover, under Michigan law, the State Board of Education does not have the authority to terminate the continued operation of the programs at issue here. In any event, this lay legal opinion is contrary to the decisions of the Michigan courts and, in light of this Court's grant of certiorari, decidedly premature.

II. The GRPS Educational Services.

A. Introduction.

Since early in this century, the Michigan legislature has entrusted local public school districts with the discretionary authority to develop educational programming which they believe will most effectively meet local educational needs.[7] In this framework, local districts are free to develop and implement a vast array of educational services consistent with their communities' needs or desires and their ability to meet them — an arrangement which encourages responsible experimentation and creativity at the local level. Moreover, the Michigan legislature has authorized the payment of state school aid funds to local boards of education for part-time instruction, by public school teachers, of nonpublic school students who are also part-time public school students. (J.A. 157).[8] As recognized by the Court of Appeals majority (2a), recent decisions of the Michigan judiciary have specifically analyzed and approved the constitutionality of such instruction for part-time public school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control. *Traverse City School District* v. *Attorney General*, 384 Mich. 390, 185 N.W.2d 9 (1971); *Citizens to Advance Public Education v. Superintendent of*

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[7]

The present general enabling provision is contained in Mich. Comp. Laws § 380.1282 (1979). For a listing of the predecessor provisions, see the Historical Note to Mich. Comp. Laws Ann. § 340.583 (West 1976) (repealed).

[8]

For a full explanation of state funding for part-time public school students that also attend nonpublic schools, see J.A. 152-159 and 70a-73a.

Public Instruction, 65 Mich. App. 168, 237 N.W.2d 232 (1975), *appeal denied*, 397 Mich. 854 (1976).

In accord with those precedents and its basic philosophy of education, which is to provide educational opportunity for the *total* community,[9] the GRPS have made available to its Grand Rapids constituency a variety of instructional offerings designed to meet the many and varied local educational needs. At issue in this case are those remedial and enrichment offerings which were made available to approximately 11,000 students on premises leased from forty-one area nonpublic schools[10] through the operation of the Shared Time and Community Education programs. Those programs were offered by the GRPS beginning with the 1976-77 school year and continuing through the 1981-82 school year. The type of course offerings and the number of part-time public school students receiving such educational opportunities remained constant during the last four years those programs were offered. (J.A. (¶31) 302).

Before addressing the specifics of such programming, it is helpful to place that programming in perspective with a brief review of the unique community characteristics found in Grand Rapids.

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[9]

J.A. 164, 195, 201, (¶6) 296. The parenthetical paragraph citations (¶ .....) refer to petitioners' Proposed Findings of Fact filed with the District Court which are contained in the Joint Appendix as a "road map" to the massive trial record. Those findings include numerous supporting record references.

The "Sworn Offers of Proof" beginning at J.A. 52, *were received in evidence* by stipulation of the parties. (Record, vol. VIIA, at 1059-1061, vol. VIIIB, at 1380, 1384-1385).

[10]

This number includes one secular, private school, Climbing Tree. (J.A. 199).

B. **The Grand Rapids Community.**

Grand Rapids is a religiously-pluralistic[11] community in which approximately 30% of the school age population (*i.e.*, grades K-12) attend nonpublic schools. In the 1981-82 school year,[12] 11, 362 students (J.A. 221) attended forty-three area nonpublic schools and 26,148 students[13] attended fifty-one area public schools. GRPS Exhibit JJ, a map of the city (J.A. 199), depicts the number and location of local public and nonpublic schools. In 1981, the GRPS published a statistical sum-

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[11]

When subdivided as groups according to religious orientation, the forty-three area nonpublic schools may be categorized as follows:

Private (Non Sectarian)	1
Christian (1 High School)	12
Lutheran	3
Baptist	1
Seventh Day Adventist	1
Catholic (2 High Schools)	25
Total	43

(J.A. 199). The proofs showed that children from as many as fifty different denominations attended some of the Christian schools (J.A. (¶280) 369; Record, vol. IIB, at 423-424, vol. IVA, at 634-637) and in some of the Catholic schools, nearly one-half of the student body was non-Catholic. (J.A. 107, 121, (¶269) 365). This was particularly true in inner-city Christian and Catholic schools with substantial minority pupil enrollments. (J.A. 112, 121, 137, Record, vol. IVA, at 629-630).

[12]

That school year was the last year prior to the lower court ruling.

[13]

The enrollment statistics for the GRPS were (J.A. 215-221):

Grade Levels	*No. of Schools*	*No. of Students*
Elementary	42	14,261
Middle (Jr. High)	5	3,490
High School	4	6,608
Alternative Schools	4	727
Special Education	8	1,062
TOTAL		26,148

mary examining the distribution of public and nonpublic school students over an eleven-year period of time, beginning with the 1971-72 school year. The study included enrollment data which predated the programming here at issue by some five full school years. The study clearly demonstrated that the percentage of the schoolage population attending area nonpublic schools (i.e., 30%) has remained essentially constant. (J.A. 221).

The GRPS is governed by board members elected by the total population, including those parents who send their children to nonpublic schools. In addition, those parents participate in elections which set the property tax rates for school district operating purposes, and they support the GRPS with their property taxes. Mich. Const. art. IX, § 6. The GRPS have developed an educational philosophy which seeks to make educational opportunity available to the total community. (J.A. 201, 164-165). At issue in this case is not the propriety of that commitment, but the local educational options which were implemented to meet the community's needs.[14]

C. The GRPS Programs.

1. Scope of Appeal.

The term "Shared Time" refers to instructional offerings on premises leased from area nonpublic schools *during regular school hours*. The term "Community Education," on the other hand, refers to *leisure-time* instructional offerings made available on premises leased from area nonpublic schools *after*

[14]

The respondents did not challenge the evening Community Education program which is offered at some 260 different leased sites (*i.e.*, factories, senior citizens centers, hospitals, nonpublic schools, churches, etc.) for the benefit of over 35,000 local residents. (J.A. (¶¶11-12) 298). Their challenge was limited to daytime leased premises programming.

regular school hours. Although the scope of the District Court action encompassed Shared Time and Community Education programming on the elementary *and* secondary levels, the scope of the appeal to the Court of Appeals, and the scope of the instant appeal, was and is limited to the following:

1. Shared Time instruction on the elementary level in remedial and enrichment math, remedial and enrichment reading, art, music, and physical education.[15]

2. Shared Time instruction on the secondary level in math topics, a remedial math course.

3. Community Education instruction on the elementary level in voluntary, leisure-time activities such as model building, rug hooking, and arts and crafts.[16]

2. Equal Availability of GRPS Supplemental Educational Opportunities.

The GRPS enhanced its core curriculum for full-time public school students by providing supplemental, remedial and enrichment educational opportunities to needy and gifted students. (J.A. 166-167, 172, (¶199) 344, (¶¶229-230) 352). These supplemental educational opportunities augmented the students' ability to benefit from the core curriculum. In order to make these opportunities equally available to all needy and

[15]

J.A. 197. The Outdoor Education, Industrial Arts, and Educational Park programs are not at issue in this appeal. The extent to which the forty-one nonpublic schools participated in the programs varied from school to school.

[16]

For a complete listing of the Community Education courses offered during the 1981-82 school year, see J.A. 206-213. Approximately 3,000 students attended the elementary leased premises Community Education program for that year.

gifted school-age children in the community, regardless of their parents' choice of the school of primary attendance, the GRPS initiated the challenged programs in 1976. They did so because of (1) the existence of unmet educational needs which the district was able to meet, (2) the inability of other programs, federal or otherwise, to meet fully those needs,[17] and (3) the revenue potential which would thereby increase the district's general operating budget. (J.A. 108-109, 181-182, (¶27) 301). The revenues received by the school district under the state aid formula for such programs in the 1981-1982 school year exceeded the cost of the instructional services by $3,000,000 dollars, thereby also increasing the revenues available for and enhancing the instructional opportunities provided to full-time public school students. (74a n.6).

None of the course offerings at issue in this appeal served to supplant or replace educational programming otherwise provided by area nonpublic schools. (J.A. 109, 138, 146, (¶35) 304, (¶211) 347; Record, vol. VIIIA, at 1329). The nonpublic schools with children participating in the programs in each instance previously provided and continued to provide a basic core curriculum required for graduation or progression from grade to grade in the respective nonpublic school systems. (J.A. 109, 135, 147, (¶33) 303). The programs did not entail the payment of public funds to nonpublic schools or their teachers.[18] The GRPS educational services were designed to meet the special needs of educationally needy and gifted children and to provide nonpublic school children with educational opportunities beyond the basic nonpublic school core curriculum.[19]

[17]

For example, Title I of the Elementary and Secondary Education Act of 1965. (J.A. 181-182, (¶253) 359).

[18]

The nonpublic schools did receive rent for the facilities leased by the GRPS (J.A. (¶128) 323; Record, vol. VB, at 920, (¶131) 324, Record, vol. VIIB, at 1171). *See* note 23 *infra*.

3. Location for Providing GRPS Supplemental Educational Opportunities.

The decision to provide these supplemental, educational opportunities on leased premises was based upon the following considerations: (1) the physical impossibility of providing such programs in the limited space available in public school buildings;[20] (2) the prohibitive transportation costs ($830,000.00 annually) associated with providing these programs in public school buildings; and (3) the desire to eliminate unnecessary pupil transportation which detracts from the overall educational effort in light of the "time-on-task" studies which clearly indicate the educational desirability of minimizing lost student instructional time. (J.A. (¶¶135-136) 325; Record, vol. VIA, at 990-991, vol. VIIA, at 1098-1099).

[19]

Hereafter, petitioners will use the terms "supplementary" and "non-substitutionary" to refer to these particular aspects of the Shared Time and Community Education programs.

[20]

At trial, the GRPS introduced a comprehensive feasibility study which evaluated space and distance considerations in light of the 1981-82 school year statistics. (GRPS Ex JJaa-qq). Based upon the statistics and data compiled, it was concluded that it would not be feasible to conduct the Shared Time program at public school buildings. (J.A. 194). The GRPS transportation study demonstrated that the transportation costs alone would exceed $830,000 annually. (Record, vol. VIIIA, at 1341-1342).

4. The Nature of the Services Provided.

a. Shared Time.

The Shared Time program[21] consisted of supplemental GRPS secular course offerings for youngsters which were taught by subject area specialists. (J.A. 165-166, (¶25) 300). Through this program, part-time public school students received instruction in remedial and enrichment mathematics, remedial and enrichment reading, art, music, and physical education. None of the Shared Time course offerings at issue in this appeal were either required for graduation or for progression from grade to grade in any of the area nonpublic schools. (J.A. 109, 147, 174-177, (¶36) 304, (¶¶259-260) 361). None of these courses were previously offered by any area nonpublic school. (J.A. (¶34) 303, (¶35) 304). Most of these instructional offerings met only one or two class periods per week, and in some instances, only met once or twice a month. (J.A. (¶38) 305). All of the Shared Time instructional offerings were also available to full-time public school students through the public schools. (J.A. 162-164, (¶40) 305, (¶199) 344).[22] In making these instructional opportunities available, the GRPS did not discriminate among area nonpublic schools or their students. (J.A. 178, (¶41) 305). All eligible students were offered the opportunity to participate.

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[21]

The 1981-82 budget for the Shared Time program which included programming not involved in this appeal, was $1,923,000, or 1.7% of the total operating budget for the district. (J.A. 196).

[22]

Although the term "Shared Time" encompasses those services actually provided on leased premises, the substance of the instructional offerings thus made available were no different from the offerings otherwise available to full-time public school students. Indeed, because of that fact, Shared Time classes were attended exclusively by students who attended area nonpublic schools, even though the program was open to any eligible student. (J.A. (¶139) 326; Record, vol. VB, at 925).

In organizing the Shared Time program each year, the Shared Time director would contact all area nonpublic schools to distribute information concerning the availability of such educational offerings for their sutdents. (J.A. 182-183, (¶173) 336). As part of the information disseminated, the GRPS would provide nonpublic school administrators with written Shared Time Guidelines outlining the conditions of public school control under which the programming would be provided. (J.A. 214). Once the Shared Time director received pupil and course information from the area nonpublic schools, he would then contact the GRPS subject area supervisors to make arrangement for GRPS teaching personnel. (J.A. 183-184, 198). He would also make arrangements for appropriate classroom space in order to accommodate the program (J.A. 184, 202-204) by entering into written standard form leases with the area nonpublic schools for the rental of classroom space on a per-class usage basis.[23] Under the terms of the lease, it was required that the rooms be free of any religious symbolism and that they be posted as public school classrooms during the period of public school instruction. (J.A. 124, 200, 202, (¶¶133-134) 324).

Both Courts stated that "[a] significant portion of the Shared Time instructors previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed." (75a, 6a). This is contrary to the record. The uncontroverted testimony of John Young, the Shared Time director, was as follows:

> Q. . . . [H]ow many if those [*i.e.*, Shared Time instructors] previously were employed by one of the non-

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[23]

The GRPS paid $6.00/class/wk for elementary classroom space and $10.00/class/wk for secondary classroom space. These rental amounts were established following a study of the costs and expenses which the public schools incurred in their own buildings. (J.A. (¶131) 324, Record, vol. VIIB, at 1171).

public schools that we have had discussion about in this case?

A. [Of] [t]he 131 contracted GRPS teachers currently teaching in the Shared Time daytime programming, 13 of those formerly were employed by the nonpublic schools prior to their becoming public school teachers. Three of those people in checking their records are not employed by the GRPS teaching in the same area that they taught at.

(J.A. 193). Accordingly, less than 10% of the GRPS teachers providing Shared Time programming were previously employed by area nonpublic schools.

b. **Community Education.**

The Community Education[24] program on the elementary level consisted of voluntary, leisure time offerings which were made available to interested students on leased premises after regular school hours. (J.A. 166-168, (¶206) 346, (¶208) 347). These courses normally met once each week for a twelve-week period. (J.A. 167-168, (¶208) 347; Record, vol. VIIIA, at 1329). They included rug hooking, model building, arts and crafts, and the like. (J.A. 206-213). None of the Community Education programs previously existed in any of the area nonpublic schools. (J.A. 187, (¶211) 347). Additionally, similar programs were available to all full-time public school students. (J.A. 167, (¶210) 347).

The organizational process was somewhat different for Community Education. The director for Shared Time testified that the initial step required the selection of an instructor who was known by the students because the success of a voluntary

[24]

The 1981-82 budget for the Community Education program, which included programming not involved in this appeal, was $926,000, or .9% of the total operating budget for the district. (J.A. 196).

community education program depends in large measure upon the identity of the teacher. (J.A. 186-187, (¶212) 348). Therefore, as was the case with the Community Education program conducted in the public elementary school buildings, in most instances, the instructors would be individuals teaching within that building during the regular school day. (J.A. 186-187, (¶212) 348, (¶213) 349). Of course, during the period of Community Education instruction, that instructor was employed as a part-time public school employee. Normally, the director of Shared Time would contact potential instructors to determine whether they would be willing to teach leisure time courses. Once a teacher had been selected,[25] a survey would be conducted to determine whether there was sufficient student interest to warrant offering the course. (J.A. (¶212) 348). If twelve students were interested, the course would be offered.

5. **The Delivery of the Services.**

Once the Shared Time program was organized, the GRPS subject area supervisors (J.A. 198) would assign teaching specialists to provide instruction. (J.A. 166, (¶25) 300, 183-184, (¶174) 338). In most instances, Shared Time teachers would receive teaching assignments in both public school buildings and in leased facilities. (J.A. 63, 68, 85-86, 95, 102; Record, vol. VIIB, at 1223). Typically Shared Time classes would meet only once or twice a week. (J.A. (¶38) 305). In the remedial and enrichment reading and math courses, GRPS teachers would independently analyze and evaluate potential students in order to select those who would be best served by participation in the program. (J.A. 60, 74-75, 78, (¶142) 327). Once such students had been identified by GRPS teachers, they would provide the needed educational instruction. In physical

[25]

In the 1981-82 school year, the GRPS employed approximately three hundred part-time instructors in Community Education. (J.A. (¶222) 350; Record, vol. VIIIA, at 1330-1331).

education, music and art, all of the elementary students in participating nonpublic schools received such GRPS supplementary, educational services.

From their inception to implementation, the classes were exclusively controlled by the public school distrct. The GRPS not only decided what would be offered[26] and where,[27] but also, who would teach,[28] when,[29] what would be taught,[30] what materials, supplies, and equipment would be used,[31] and how students would be selected, graded, and, if necessary, disciplined.[32] Shared Time and Community Education teachers were hired,[33] assigned,[34] evaluated, and supervised[35] by public school supervisors. Nonpublic school administrators neither controlled who was assigned to teach,[36] nor did they control what was taught[37] or the

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[26]
J.A. 182-183, 187, 214.

[27]
J.A. 184.

[28]
J.A. 52-54, 186, 214.

[29]
J.A. 96, 103, (¶162) 332.

[30]
J.A. 182-183, 206-213, 214.

[31]
J.A. 60, 70, (¶188) 341.

[32]
J.A. 60-61, 64-65, 78, (¶141) 326, (¶144) 327, (¶193) 342.

[33]
J.A. 52-54, (¶179) 339, 186, (¶223) 350.

[34]
J.A. 183-184, (¶174) 338, (¶232) 352.

[35]
J.A. 54-55, (¶156) 330, (¶232) 352.

[36]
J.A. (¶202(b)) 345, (¶226) 351; Record, vol. IIIA, at 469.

[37]
J.A. (¶202(d)) 345.

teaching methodologies utilized in providing such teaching services.[38]

Each year, Shared Time instructors would receive instructions concerning the GRPS Guidelines governing the provision of the secular services in question. (J.A. 184-185). They were instructed that (1) they were public school employees subject solely to the supervision and control of their GRPS supervisors; (2) they were not to discuss religion; (3) they were to follow the GRPS curriculum; (4) they were to teach in leased GRPS classrooms free of religious symbolism; and (5) they were to report any problems to their GRPS supervisors. (J.A. 214).

The Shared Time teachers, like all GRPS teachers, were required to attend regularly scheduled in-service training programs where teachers would meet with their subject area supervisors on a monthly basis in order to discuss recent educational developments and other matters which might improve their teaching effectiveness. (J.A. 57, (¶¶154-155) 329). Additionally, those meetings provided a forum in which to reinforce orientation instructions regarding the guidelines which applied in the operation of the Shared Time program. (J.A. (¶155) 329, (¶166) 333). All Shared Time instructors were subject to the GRPS Progressive Evaluation Performance (PEP) program. Under that program, Shared Time teachers (like all full-time GRPS teachers) were observed in the classroom setting by their GRPS subject area supervisors and provided with a written evaluation of their performance consistent with district standards. Nonpublic school administrators did not have any input into the evaluation process. (J.A. 54-55, 137, 146, (¶156) 330).

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[38]
J.A. 124, (¶202(c)) 345.

This case provides a very extensive record which outlines the six-year operational history of the programs. That record contains testimony from nine public school administrators, two public school Board members, and twenty Shared Time teachers, all of which outline in detail the nature, operation, and effect of the programming. There is no indication in the record that the location of the services in any way affected the content of the courses, the teaching methodology utilized to accomplish the GRPS performance objectives, or the goals and aspirations of the individual GRPS teachers for their students. (J.A. 68, 88, 97, 102, 105, (¶¶160-161) 331). None of the teachers had any difficulty teaching within the Shared Time Guidelines (J.A. 214), nor did they in any way feel that the location of the instructional services affected or impacted the secular services which they provided. (J.A. (¶¶160-161) 331). The secular content of these courses was recognized by the Court of Appeals majority:

> There is no proof that any teacher in either Shared Time or Community Development [*sic*] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

(35a).

SUMMARY OF ARGUMENT

This case presents an important issue left unresolved by this Court's earlier establishment clause decisions — the constitutionality of providing supplemental instructional services to nonpublic school students on premises leased from religiously-oriented nonpublic schools under conditions of public school control.

The Court of Appeals majority erroneously applied a *per se* rule that such programs are inherently unconstitutional. Such

establishment clause methodology is impermissible. There are no fixed, *per se* rules in establishment clause cases. The Court of Appeals should have evaluated with particularity the trial record in this case. If it had done so, it would have determined that the programs at issue violated neither the guidelines embodied in the "three-prong test" nor the underlying policy concerns of the establishment clause. The secular educational purpose of the programs was not in dispute. Nor did the programs have the impermissible effect of conferring a substantial benefit on religion. The GRPS did not teach religion, endorse the religious character of the nonpublic schools, subsidize the operation of the affected nonpublic schools, or provide supplemental, secular educational opportunities to part-time public school students that were not also available to full-time public school students. There was no excessive entanglement with religious authorities since the public school teachers teaching on leased premises were under the exclusive control of the GRPS. Administrative contact with nonpublic school personnel in the implementation of these programs was limited and the record shows no friction over the programs' six-year history.

By imposing this *per se* prohibition, the Court of Appeals has significantly constrained GRPS's ability to meet the educational needs of all its citizens in an effective and cost-conscious manner. Such judicial interference with the responsibilities of local government ought not be sanctioned in the absence of a record establishing an actual violation of a constitutional guarantee.

Respondents' reliance on conjecture and a *per se* rule rather than on the actual record should not be surprising. Their lack of personal injury prevents their even presenting the concrete adverseness upon which the court depends in the litigation of difficult constitutional questions. They can assert no injury as taxpayers and suffer only "the psychological consequence presumably produced by observation of conduct

with which one disagrees." *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

ARGUMENT

I.

WHEN ANALYZED IN LIGHT OF THE ACTUAL RECORD IN THIS CASE RATHER THAN BY THE PER SE METHODOLOGY EMPLOYED BY THE COURT OF APPEALS MAJORITY, THE GRPS PROGRAMS ARE COMPATIBLE WITH THE ESTABLISHMENT CLAUSE.

A. Introduction: The Need to Avoid "Categorical Imperatives" and "Absolutist Approaches".

In analyzing the intended objectives of the establishment clause, this Court has consistently acknowledged that the required separation between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier" whose application and ultimate result depend in large measure on the factual circumstances of each case. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Lynch v. Donnelly*, ... U.S. ...., 104 S. Ct. 1355, 1359 (1984). Some contact between the respective realms of church and state is inevitable.

> A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. In fact, our State and Federal Governments impose certain burdens upon, and impart certain benefits to, virtually all our activities, and religious activity is not an exception. *The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required.*

Roemer v. Board of Public Works, 426 U.S. 736, 745-746 (1976) (emphasis supplied).

In the context of that reality, what the establishment clause does require is government neutrality towards religion. *See, e.g., Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Walz v. Tax Commission*, 397 U.S. 664 (1970). This ultimate goal of neutrality, however, like most constitutional questions requires a sensitivity to the realities of American life. As observed in *Walz v. Tax Commission*:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. *Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.*

397 U.S. at 669 (emphasis supplied). In essence, the goal of neutrality seeks to insure a course of government conduct which neither advances nor inhibits religion while at the same time permits religiously-sponsored activities and those of the civil government to co-exist in the secular world.

In delineating an analytical framework for the resolution of cases under the oft-cited "three-part" establishment clause test, this Court in its recent cases has charted a course which avoids the use of "categorical imperatives" or "absolutist approaches at either end of the range of possible outcomes." *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). Justice White, in analyzing the Court's historical approach to such cases, observed:

> This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the states — the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth — produces a single, more encompassing construction of the Establishment Clause.

444 U.S. at 662. Or, as recently stated in *Lynch v. Donnelly*, ... U.S. ...., 104 S. Ct. at 1361, "no fixed, *per se* rule can be framed." Rather, in each case, lines must be drawn concerning the scope of permissible governmental conduct.

Consequently, the "three-part test" has not served to set the "precise limits to the necessary constitutional inquiry," *Meek v. Pittenger*, 421 U.S. 349, 359 (1975), but rather, as a guideline "with which to identify instances in which the objectives of the Establishment Clause have been impaired," 421 U.S. at 359, namely, the " 'sponsorship, financial support, and active involvement of the sovereign in religious activity' " *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. at 772, the three primary evils against which the establishment clause is directed. Again, in *Lynch v. Donnelly*, 104 S. Ct. at 1362, the Court emphasized that, while the three-pronged test is "useful," what is really important is whether the challenged legislation or official conduct "establishes a religion or religious faith, or tends to do so." *Id.* at 1361.

The Court of Appeals, and, indeed, the District Court, failed to employ the establishment clause methodology consistently articulated by this Court. Instead the Court of Appeals majority premised its ultimate establishment clause result on a *per se*, geographic ruling that supplemental public school instruction on leased premises at religiously-oriented, nonpublic schools is inherently unconstitutional. (*E.g.*, 32a). That ultimate result is also inconsistent with many of the subsidiary findings of the courts below which, as we shall demonstrate, support the constitutionality of the instant programs.

If the Court of Appeals majority had approached its analysis in a manner consistent with the holdings of this Court and relied upon the "three-pronged test" as a guide to its inquiry, the result would have been, as we shall point out in the following paragraphs, markedly different.

B. The Secular Purpose of the Programs.

In this case, plaintiffs have never seriously questioned the secular purpose of the programs. Both lower courts recognized that the Michigan legislature in authorizing the programs, and the local school authorities in establishing the programs, were motivated by secular educational purposes. (91a-94a, 21a). Further, the district court expressly found that the instructional activities in question had "a positive impact on the participating nonpublic school students" (94a-95a), and that the remedial reading and remedial mathematics portions of Shared Time "confer invaluable benefit upon those children that participate in them." (District Court Opinion of August 19, 1982, at 6 (denying a stay)).[39] Clearly, the GRPS achieved its secular educational purposes.

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[39] The trial record established that the Shared Time remedial programming served to reach educationally needy students who did not receive Title I services either because they did not reside in Title I target areas, or because of the limited federal funds available. (J.A. 180-182, (¶253) 359).

C. **The Primary Effect.**

1. **No Teaching of Religion.**

Plaintiffs presented no evidence that any GRPS Shared Time or Community Education teacher taught religion. The Court of Appeals majority, noting that "[w]e accept, as did the District Judge, the facts upon which the appellants chiefly rely" (35a), concluded:

> There is no proof that any teacher in either Shared Time or Community Development [*sic*] classes has sought in such classes to indoctrinate any student in accordance with the school's religious persuasion.

(35a). This clear and unequivocal finding, based upon the trial record, dispels any judicial apprehension that these programs will lead to the teaching of religion by public school teachers. The speculative potential for fostering religion in the incipient programs before the Court in *Meek v. Pittenger*, 421 U.S. 349, 369 (1975), did not become a reality here.

It is also legitimate in establishment clause analysis to inquire whether the sectarian function dominates the activities of the nonpublic schools in question. This inquiry is, however, only an initial step. The next and more crucial step in the analysis is to determine to what extent, if any, the sectarian atmosphere of the nonpublic schools affected the conduct of public school personnel on leased premises.

With respect to the nature of the institutions, the record demonstrates that the GRPS teachers providing the challenged instruction worked on premises leased from institutions de-

voted in significant part to providing secular education.[40] They employ only certified teachers, they provide core subjects comparable to those found in the public schools, they utilize secular textbooks suitable for use in public school classrooms, they meet the secular accreditation standards of the University of Michigan and their graduates meet the secular requirements for admission to public institutions of higher education. (J.A. 142, 145; Record, vol. IB, at 157-158, vol. VIIIA, at 480, vol. VA, at 846-847).

With respect to the effect of the religious nature of the schools on the programs at issue, the public school Shared Time teachers uniformly testified that there was no religious pressure or influence exerted upon them by nonpublic school personnel to incorporate religious matters into their teaching. (J.A. (¶160) 331). Although some public school Shared Time teachers acknowledged a religious atmosphere in some of the nonpublic schools where they provided instruction on leased premises, their consistent, uncontroverted testimony was that such an "atmosphere" had absolutely no impact or affect upon their course content or manner of teaching, and it did not cause them to introduce religion into their classes. (J.A. (¶161) 331). The public school Shared Time instructors were subject to the same evaluation program utilized by the public schools in evaluating the performance of the other teachers in the school district. The evaluation process consisted of classroom observation, in leased premises, and written evaluations by GRPS subject area supervisors that were placed in

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In Michigan, religiously-oriented nonpublic schools perform the dual functions of providing both secular education and religious instruction. *Advisory Opinion re Constitutionality of P.A. 1970, No. 100*, 384 Mich. 82, 97-98, 180 N.W.2d 265, 270-271 (1970), *appeal dismissed*, 401 U.S. 929 (1971). Indeed, the Michigan legislature requires nonpublic schools to employ certified teachers and to teach secular subjects comparable to those taught in the public schools. Mich. Comp. Laws § 388.551 (1979); Mich. Comp. Laws § 380.1561(3)(a) (1979).

the teachers' personnel files. The purpose of the evaluations was to ascertain whether the teachers were effectively teaching the secular curriculum of the public schools. (J.A. (¶156) 330). A by-product of the evaluation process was to assure that religious views were not being advanced by GRPS teachers.

Here, unlike *Meek v. Pittenger*, we have a trial record reflecting the six-year operational history of the challenged activities on leased premises. Based on that record, it is clear that the fears expressed in *Meek*, concerning the potential advancement of religion by public school teachers were not realized. In short, the challenged programs helped teach students how to read and how to add, not how to pray. The GRPS simply provided discrete, secular educational benefits to part-time public school students through course offerings taught by public school teachers on leased premises.

2. **No Transfer of Financial Responsibility.**

The Court of Appeals majority quoted the District Court's statement that:

> Another glaring nonsecular effect of the programs is that *financial responsibility* for teaching Physical Education, Art, Music, and all of the other available course offerings *has been transferred from the private religious schools to the taxpayers*. . . .

(24a) (emphasis supplied). That statement is both contrary to the trial record and inconsistent with the express subsidiary factual findings of the lower courts since the challenged programs did not relieve the nonpublic schools of the expense of doing anything.

The School Code of 1976, Mich. Comp. Laws § 380.1 *et seq* (1979), contains no requirement that the courses at issue must

either be completed for graduation, or, that they must be offered by nonpublic schools. (J.A. 172-177). Clearly, the supplemental GRPS instruction which is the subject of this appeal did not relieve the nonpublic schools of their legal requirement to provide a secular core curriculum. *Mich. Comp. Laws* § 380. 1561(3)(a) (1979). (50a).

The GRPS Shared Time elementary level courses were not previously offered in the area nonpublic schools. (J.A. (¶34) 303, (¶35) 304). None of those courses were required for either graduation or progression from grade to grade by the nonpublic schools. (J.A. (¶36) 304). Similarly, the GRPS Community Education classes were not previously provided by any area nonpublic schools. (J.A. (¶211) 347).

The Court of Appeals majority, in adopting the trial court's statement of facts, concluded:

> The specific courses available through the elementary level Shared Time programs *would not otherwise be available in any of the nonpublic schools, and are not required for graduation or progression to the next grade.*

(7a) (emphasis supplied).

> Of the nonpublic schools presently participating in the Community Education program, none have ever provided an identical course to their students. In that respect, Community Education courses *do not represent substitutes for courses formerly offered at nonpublic schools.*

(9a) (emphasis supplied). Accordingly, based upon the trial record, the lower courts' own subsidiary findings and logic, the contention that there was a transfer of financial responsibility is patently incorrect.

In any event, the transfer of financial responsibility argument arises without regard to the location at which educational services are provided. In *Wolman v. Walter*, 433 U.S. 229, 246-248 (1977), this Court rejected the claim that providing therapeutic, guidance and remedial services to classes composed solely of nonpublic school pupils, off the premises of the nonpublic schools, constituted direct aid to sectarian institutions. Consistent with the *Wolman* analysis, the instant educational services do not constitute general assistance to religiously-oriented nonpublic schools with the primary effect of advancing or endorsing religion.

In *Everson v. Board of Education*, 330 U.S. 1, 17 (1947), and *Board of Education v. Allen*, 392 U.S. 236, 244 (1968), it was acknowledged that perhaps state paid bus fares and free textbooks might increase the attendance at sectarian nonpublic schools. However, that speculative possibility was an insufficient basis upon which to conclude that a primary effect of either program was to advance religion.

Here, as Judge Krupansky observed, based upon the uncontroverted record:

> At best, the Community Education and Shared Time programs permit the nonpublic schools to offer an expanded supplemental curriculum at the facilities in issue. *There is no evidence of record, however, that this expanded curriculum has resulted in an increase in the enrollment of the participating institutions. In fact, the percentage of school age children in Grand Rapids attending nonpublic schools has remained within 1 percentage point of 30% from 1971 (5 years prior to implementation of the Shared Time and Community Education programs in 1976) to 1981.* The district court entered no finding nor is there support in the record that the nonpublic schools involved were economically distressed or that the challenged programs provided an economic lifeline to sectarian institutions. Rather, the record discloses that said institutions enjoyed and continue to enjoy economic self-sufficiency. In sum, there is no evidence that the sectarian institutions were relieved of fiscal responsibilities or depended upon the challenged programs for economic survival.

(51a); (J.A. 215-221, (¶239) 353, (¶246) 357, (¶247) 357) (emphasis supplied).

There was no *transfer* of financial responsibility. Nonpublic school enrollments did not increase. No nonpublic schools were saved from closing for financial reasons. These programs simply expanded the range of secular educational opportunities available to nonpublic school students as part of a general community-wide effort on the part of the GRPS to provide supplemental, secular educational benefits to all children in the community, thereby enhancing their ability to profit from the core curriculums of their respective schools of primary attendance.

3. Community-wide Class of Beneficiaries.

The GRPS decision to institute the Shared Time and Community Education programs was motivated by a desire to make supplemental educational opportunities found in the public schools equally available to those students attending nonpublic schools. Indeed, plaintiffs' counsel in this case conceded at trial that:

> We don't claim in this case that courses that are being offered in the nonpublic schools are not available in the public schools.

(J.A. 178). The record establishes that full-time public school students have the same instructional services available to them

that were provided to part-time public school students in the Shared Time and Community Education programs. (J.A. (¶40) 305, (¶210) 347). The District Court observed that "[t]he educational programs at issue are certainly consistent with the School District's Philosophy of Education, which is dedicated to the provision of secular educatonal opportunities for the entire community." (94a). The appellate majority, in adopting the trial court's statement of facts (4a), observed:

> Shared Time is a program wherein the school district offers substantive courses *from its general curriculum* to nonpublic school students during regular school hours.

(6a) (emphasis supplied).

> Although certain Community Education courses offered at non-public school sites are not offered at the public schools on a Community Education basis, *all Community Education programs are otherwise available at the public schools*, usually as part of their more extensive regular curriculum.

(9a) (emphasis supplied).

In light of the foregoing, the conclusion of the courts that "[t]he challenged programs impact upon a very narrow religious class of beneficiaries" (23a) cannot be sustained. That conclusion is contrary to plaintiffs' claims, at odds with the trial record, and even inconsistent with the findings of the lower courts.

Here, like the child benefit programs sustained in *Everson* and *Allen*, the class of beneficiaries included all school children within the community, both full-time public school students and part-time public school students who also attended either religiously-oriented or secular nonpublic schools. *See also Mueller v. Allen*, ... U.S. ....., 103 S. Ct. 3062, 3068-69

(1983). Certainly, the class of beneficiaries here was as broad as the class of beneficiaries upheld in *Wolman*, 433 U.S. at 241 n.9, 244 n.12, *i.e*, both public and nonpublic school students.

The challenged programs neutrally provided supplemental government benefits to a broad spectrum of children, *Mueller*, 103 S. Ct. at 3068. The provision of secular educational benefits to all children in the community certainly does not communicate "a message of government endorsement or disapproval of religion." *Lynch*, 104 S. Ct. at 1368 (O'Connor, J., concurring).

All children in nonpublic schools, secular or religious, had the opportunity to participate in the challenged programs. (J.A. 177-178, (¶41) 305). Here, Shared Time and Community Education instruction, like transportation reimbursement in *Everson* and textbooks in *Allen*, were child benefit programs made available to a broad class of both public and nonpublic school students. The beneficiaries were not designated on the basis of religion. No child was singled out by the GRPS as an "outsider" or an "insider" for exclusion or inclusion in those community-wide programs because of his or her primary school of attendance. *Lynch*, 104 S. Ct. at 1366 (O'Connor, J., concurring).

Utilizing an erroneous *per se* analysis, the lower courts prohibited the GRPS from continuing to accomplish the beneficial, secular effects of their programs. It is undisputed that the public school teachers did not advance the religious views of the nonpublic schools. Further, the GRPS did not relieve the nonpublic schools from providing any classes that the nonpublic schools previously provided. The educational services were made available by the GRPS to a community-wide class of beneficiaries. As such, the challenged programs did not have the impermissible primary effect of advancing or

endorsing religion in contravention of the establishment clause. Indeed, by making these educational services available to all Grand Rapids children, GRPS avoided marking some as "outsiders, not full members of the political community," *Lynch*, 104 S. Ct. at 1366, (O'Connor, J., concurring), because of their parents' choice of school for religious or other reasons. *See generally Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

D. **The Excessive Entanglement Portion of the Test.**

Respecting the issue of excessive administrative entanglement, the majority below, applying an abstract, "catch-22"[41] *per se* geographic rule of law, concluded that the provision of instruction on leased premises is necessarily impermissible under the entanglement analysis. Such an approach, petitioners submit, is contrary to the teachings of this Court in *Lynch*, *Wheeler*, *Wolman*, and *Regan*, and the better reasoned opinions of the lower courts. *See, e.g., National Coalition for Public Education and Religious Liberty v. Harris*, 489 F. Supp. 1248 (S.D.N.Y.), *appeal dismissed*, 449 U.S. 808 (1980); *Felton v. Secretary, United States Department of Education*, No. 78 CV 1750 (E.R.N.) (E.D.N.Y., October 4, 1983). These cases clearly require a detailed analysis of the record evidence rather than the mechanical application of a *per se* rule. The entanglement standard requires an analysis of the actual relationships between the public and nonpublic school personnel in order to determine whether such relationships give rise to the "excessive entanglement" proscribed by

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[41]

Based on its conclusion that there was a "real need for monitoring to insure that religious views are not advanced," the majority concluded:

> Without such monitoring the programs run the risk of enhancing religious views. If courses are monitored, the programs are still infirm in that an excessive administrative entanglement is necessitated. In either case, the same ultimate result applies and the programs cannot be sustained.

(32a).

the Constitution. To be sure, *some* "entanglement" between church and state is inevitable and constitutionally permissible. *Lynch*, 104 S. Ct. at 1364; *Hunt v. McNair*, 413 U.S. 734 (1973); *Mueller v. Allen*. The ultimate concern is to avoid that "excessive" administrative entanglement between "the government and the religious authority" which would permit "the intrusion of either into the precincts of the other." *Lemon v. Kurtzman*, 403 U.S. at 614, 615.

In delineating between permissible and excessive administrative entanglement, this Court has identified three pertinent areas of inquiry: (1) the character and purpose of the institutions benefited, (2) the nature of the aid which the state provides, and (3) the resulting relationship between the government and the religious authority. *Tilton v. Richardson*, 403 U.S. 672 (1971); *Lemon v. Kurtzman*.

1. **The Character and Purpose of the Affected Institutions.**

It is the educationally needy or gifted children, and *not* the institutions which they attend, who were the beneficiaries of the programs. However, because the administration of the programs involved some minimal contact between the public school district and nonpublic school officials, the extent to which these schools may be described as pervasively sectarian is of some limited relevance.

In many respects, the nonpublic schools whose children receive the benefits conferred by the instant programs do not fit the profile of the schools described in *Meek* and *Lemon*.[42]

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Interestingly, the Baptist schools, which clearly fit the profile criteria and opted not to permit any of their children to receive Shared Time instruction because of their unwillingness to accept public school control, are the fastest growing nonpublic schools in the Grand Rapids community. (J.A. (¶¶293-300) 373-377).

These schools are not church governed, but rather, are controlled by elected, lay boards of education and membership on such boards is not restricted by religious affiliation;[43] they do not limit student admissions on the basis of religion;[44] they do not limit staff hirings on the basis of religion;[45] they do not impose religious restrictions ragarding the teaching of secular subjects;[46] such schools do not inculcate religion or force students to accept or reject any particular religous doctrine;[47] these schools provide religious instruction separate and apart from their secular educational function, and no student is forced to participate in religious worship;[48] and

[43]
Catholic: J.A. 106, 115-116.
Christian: J.A. 133-134.
Lutheran: J.A. 147-148.
For additional record references regarding the pervasively sectarian issue, see J.A. 362-373.

[44]
Catholic: J.A. 107, 112-113.
Christian: J.A. 136.
Lutheran: J.A. 148.

[45]
Catholic: J.A. 117.
Christian: J.A. 135.
Lutheran: Contrast J.A. 151.

[46]
Catholic: J.A. 116-117.
Christian: J.A. 134-135.
Lutheran: J.A. 151-152.

[47]
Catholic: J.A. 114-115.
Christian: J.A. 135.
Lutheran: J.A. 150-152.

[48]
Catholic: J.A. 113-114.
Christian: J.A. 134-135.
Lutheran: J.A. 149-150.

these schools have a dual purpose of providing both secular and religious instruction.[49]

Even assuming *arguendo* the existence of a pervasively sectarian atmosphere, the undisputed testimony of the Shared Time teachers was that they did not teach religion (J.A. (¶159) 331), and that neither they nor their work had been in any way affected or influenced by the atmosphere in the nonpublic schools in which they taught. (J.A. (¶¶160-161) 331). In terms of course content, teaching methodology and their goals and aspirations for their students, what took place in those programs was identical to the same instructional offerings made available to full-time public school students. (J.A. (¶40) 305, (¶210) 347). These teachers did not teach religion and no pressure or influence was exerted upon them to incorporate or include such matters in the subject areas which they taught.

In ultimately concluding that the GRPS programs violated the entanglement portion of the test, the District Court and the Court of Appeals disregarded the six-year operational history and instead relied upon a hypothetical concern regarding the *potential* for the advancement of religious views or intrusive monitoring. As noted by the Court in *Regan*:

> On its face, therefore, the New York plan suggests no excessive entanglement, and *we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated.*

444 U.S. at 660-661 (emphasis supplied).

[49]
Catholic: J.A. 110-113.
Christian: J.A. 134.
Lutheran: J.A. 149.

2. **Form of the Aid.**

Assuming, *arguendo*, that the nonpublic schools in which services were offered shared some of the characteristics of the "pervasively sectarian" schools described in *Lemon* and *Meek*, the form of the aid provided was such that it did not give rise to the risk of fostering religion or excessive administrative entanglement.

Unlike most of the educational assistance cases decided in the 1970's, the recipients of the services and opportunities provided by these programs were children and not institutions. In the GRPS context, the educational services were provided by publicly employed teaching specialists (J.A. (¶147) 328, (¶222) 350), who provided their services in public school classrooms leased by the GRPS. (J.A. (¶127) 322). These teachers were subject solely to GRPS supervision and control. Nor, as these teachers testified, were they subject to the actual control or supervision of any nonpublic school administrators.[50]

In *Meek*, although the teaching personnel involved were also public school employees, this Court nonetheless felt compelled to invalidate the programs. That conclusion is inappropriate here for two basic reasons. First, because the program in *Meek* had only recently been implemented, the Court's observation was necessarily based on a record that was sparse or silent on how the publicly employed teachers performed their services, how they were supervised, and what relationships or contacts existed with nonpublic school authorities — factors which are essential in factually evaluating the actual risk of impermissibly fostering religion. By contrast, the Grand Rapids programs had been in operation for some six years,

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The nonpublic school administrators consistently testified that they understood the guidelines for the programs. (J.A. (¶¶201-202) 344-345).

and the extensive factual record developed speaks loudly to the absence of any such risk. Second, the Grand Rapids programs at issue here were provided for part-time public school students in *leased* premises under conditions of *public school control*. Public schools may, of course, use a lease to acquire and control needed classrooms. *See Nebraska State Board of Education v. School District*, 409 U.S. 921, 925-26 (Brennan, J., concurring), *denying cert. to School District v. Nebraska State Board of Education*, 188 Neb. 1, 195 N.W.2d 161 (1972).

Over 90% of the teachers providing services through the Shared Time[51] instructional program did not have a work history which included employment with Grand Rapids nonpublic schools. (J.A. 193-194). In addition, the itinerent Shared Time teachers were usually assigned a variety of locations, including premises both owned and leased by the GRPS. (J.A. 63, 68, 85-86, 95, 102; Record, vol. VIIB, at 1223). These facts reduced the danger referred to in *Meek* that public school employees might introduce religion into their classes.

The unchallenged testimony of GRPS administrators, teachers, and support professionals removes any concern that these courses could be used to foster religion. Not only did those teachers perform their services in a religiously-neutral setting, *i.e.*, a leased classroom free of religious symbolism, but also, they were routinely provided with administrative guidelines which clearly outlined the nature and extent of public school control. (J.A. (¶166) 333, (¶167) 335). Furthermore, the

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As explained earlier, virtually all of the Community Education teachers who taught in the after-school program otherwise taught for the area nonpublic schools during the regular school day. However, the nature of the subject matter taught (*i.e.*, rug hooking, model building, etc.) greatly removes the concern that religion may become a part of the instruction provided. Surely, there is no greater risk of the teacher advancing religion in teaching rug hooking after school than there is in providing diagnostic services. *See Wolman*.

GRPS not only provided such guidelines for their teachers, but also furnished nonpublic school administrators with copies of those guidelines so there would be no question concerning the terms and conditions of public school control under which the programs would be offered. (J.A. (¶175) 338, (¶202) 344-345).

GRPS teachers were reminded that they were public school employees, not employees of the nonpublic schools where they performed a portion of their teaching services. They were told that they were not subject to the supervision, control or evaluation of nonpublic school administrators, but rather, were solely responsible for what they taught and how they taught it to their public school area supervisors. They were told that these programs represented supplemental, secular instructional opportunities for children which were provided over and above the core curriculum of the nonpublic schools. (J.A. 214, (¶166) 333). They were told that the courses which they taught should not and may not serve as a substitute for the regular instructional programs of the nonpublic schools, and further, that they were not to teach religion. (J.A. (¶167) 335). They were all required to follow the GRPS curriculum and further, were required to use exclusively GRPS supplies and materials. These items were required to be stored separately from the supplies and materials in nonpublic schools in which they taught, and they were also required to be appropriately labeled as public school property. (J.A. (¶¶188-192) 341-342).

Thus, unlike *Meek*, this Court has the benefit of a detailed factual record which sets forth how the programs operated over a long period of time. That record amply demonstrates that since the implementation of these programs, there have been no instances in which GRPS teachers have ever taught or tried to teach religious topics, nor was there any evidence to suggest that such teachers became involved in the religious activities of the nonpublic schools. Quite to the contrary, the

teachers uniformly testified that they neither felt pressured nor influenced to incorporate religious matters, and further, that the religious atmosphere, to the extent they perceived it, had no affect or impact upon what they taught, how they taught, or the academic goals which they had for their students.

In sum, the evidence in this case conclusively demonstrated that the form of aid challenged presented no cognizable risk of the "impermissible fostering of religion" by Shared Time and Community Education teachers, and that there was, therefore, no need for the type of intrusive "continuing surveillance" thought necessary in *Meek*. The factual record regarding the six-year history of these programs dispels in reality what the *Meek* Court feared hypothetically. In concluding otherwise, the District Court and the Court of Appeals erred reversibly in applying their *per se* methodology.

3. Relationship Between GRPS and Nonpublic School Administrators in the Operation of the Programs.

The GRPS concluded that the most educationally effective and administratively feasible way to provide supplemental instruction to educationally needy and gifted students attending area nonpublic schools was to provide such instruction in leased facilities where the children were receiving their basic education. The record evidence adduced at trial identified two different types of administrative relationships which arose in the implementation and operation of the programs: (1) the supervision and evaluation of GRPS teachers by other public school administrators (*i.e.*, subject area supervisors), and (2) routine administrative contacts between the Shared Time and Community Education director and the nonpublic school administrators. The first of these relationships existed exclusively between *public* school employees, and not between

the government and religious authorities.[52] The second of these relationships, though involving contacts between government and religiously-oriented nonpublic schools, nonetheless amounted to merely routine and infrequent contacts designed to meet the "logistical difficulties of extending needed and desired aid to all children of the community." *Wolman v. Walter*, 433 U.S. at 247 n.14. These limited administrative contacts between "church and state" did not result in the "intrusion of either [church or state] into the precincts of the other," the primary evil which the entanglement test was designed to prevent. *Lemon v. Kurtzman*, 403 U.S. at 614.

The evidence revealed that the contacts between Shared Time and Community Education officials and the nonpublic school administrators fell into three basic categories: (1) the distribution of information regarding the available educational services; (2) the processing of requests for the receipt of such educational services; and (3) resolving scheduling problems and related matters which arose in the delivery of the services.

Recognizing that the majority below failed to utilize an analysis consistent with recent decisions of this Court, Judge Krupansky observed that the majority predicated its conclusion of inevitable excessive entanglement "upon the theory that the Shared Time and Community Education programs created a *potential* for the advancement of religious ideologies generating a need to monitor the instructors to insure neutrality." (55a) (emphasis supplied). Utilizing this *per se* rule, the

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As noted by Justice Blackmun in *Wolman v. Walter*:

> It can hardly be said that the supervision of *public* employees performing *public* functions on *public* property creates an excessive entanglement between church and state.

433 U.S. at 248 (emphasis supplied).

majority analyzed the constitutionality of the services in question in a manner "totally incongruent with the flexible nature of the establishment clause." (55a). As observed by Judge Krupansky:

> The 'entanglement' test initially pronounced in *Lemon, supra*, presupposes the existence of a potential for the advancement of religious ideologies. It has typically been utilized where there is no record as to the presence or absence of religious advancement during the course of the challenged program's administration; in such instances the court simply identifies the entanglement which would be necessary to assure that the potential for advancement is not realized. *See, e.g., Nyquist, supra.*
>
> . . . . In the action *sub judice* no instructor during the 6-year period at issue has ever utilized or attempted to utilize the Shared Time and Community Education programs as a vehicle for religious indoctrination. There is no reason to believe that continued implementation of these challenged programs will deviate from this firmly established practice in the future. At this point in the history of the programs' operations, and in light of the exhaustive record, it is beyond peradventure that there never was a necessity to monitor the program in the past and accordingly every reason to believe that the need will not

> arise in the future. Without such monitoring or need to monitor, no 'entanglement' manifests.[53]

(55a-56a).

As this Court noted in *Regan*, it is improper to accept "as an inevitability the bad faith upon which any future excessive entanglement would be predicated." 444 U.S. at 660-661 (footnote omitted). Respondents had the burden of proving the existence of excessive entanglement between government and religion. Respondents did not produce any record evidence of intrusive monitoring or other friction between public and nonpublic school personnel resulting in excessive entanglement under the establishment clause.

II.

THE RIGID APPLICATION OF PER SE RULES BY THE COURT OF APPEALS MAJORITY DEPRIVES STATES AND LOCAL SCHOOL DISTRICTS OF THE FLEXIBILITY NEEDED TO SOLVE THE LOGISTICAL DIFFICULTIES OF MEETING THE SECULAR EDUCATIONAL NEEDS OF ALL THEIR SCHOOL AGE CHILDREN.

Under our federal system of government, the primary responsibility for providing educational opportunities for our

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In similarly addressing the issue of political entanglement, Judge Krupansky concluded:

> The foregoing rationale applies with equal force to the issue of 'political entanglement'. There is no evidence of record to support the proposition that any political divisiveness has resulted in response to the Shared Time and Community Education programs.

(56a). *See* J.A. 155, (¶¶248-250) 357-358. In any event, in its recent decisions this Court has articulated the rule that inquiry into the potential for political entanglement does not arise unless the program

nation's youth is reposed in the states and their local school districts. In exercising this responsibility, the states and local school districts serve as laboratories for experimentation "to tailor local programs to local needs." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973). The 2-1 decision of the Court of Appeals panel, through the use of a *per se* prohibition on the use of leased premises, has severely constrained the ability of the GRPS to respond to the educational needs of all its students.

The Michigan legislature has authorized local school districts to address the special and supplemental secular educational needs of all school age children. To that end, the Michigan legislature has provided payment of state school aid funds to school districts for full-time and part-time public school students regardless of whether their public school instruction occurs on premises owned or leased by local school boards. (72a-73a). The section of the State School Aid Act of 1979 that appropriates state funds to school districts on a per membership pupil basis utilizes a statutory allocation formula without any total dollar limit. *See Mich. Comp. Laws* § 388.1621 (1979) (amended 1982). Each year, the Michigan Department of Education applies the automatic statutory formula to the pupil memberships reported by each school district and distributes state funds to the local districts on that basis. There is no separate legislative appropriation for part-time public school instruction on premises leased from nonpublic schools. Accordingly, there is no annual political debate over the level of appropriation for such instruction. (J.A. 152-155).

at issue provides "a direct subsidy to church-sponsored schools or colleges, or other religious institutions," *Lynch*, 104 S. Ct. 1364-65; *Mueller v. Allen*, 103 S. Ct. at 3071 n.11, a situation which does not obtain in this case.

This legislative judgment reflects a policy decision to permit local school districts to adopt a variety of methods, including the use of leased premises, to meet the educational needs of their children in a manner compatible with the particular community environment.[54] The large measure of local control present in Michigan's educational structure is thereby enhanced. *Milliken v. Bradley*, 418 U.S. 717, 742 (1974).

The GRPS elected to utilize the helpful alternative of leased premises to reach out to all students in the community, including the 30% who otherwise attended nonpublic schools. (51a). The Court of Appeals majority decision invalidated this valuable educational option by erroneously applying a wooden, mechanical *per se* rule based simply on the location at which such educational services were provided. Yet, the record establishes that, for Grand Rapids, this arrangement had worked well for over six years and had provided a quality education for the community's youngsters without any of the problems hypothesized by the Court of Appeals. Before the judiciary deprives a local community of such an important option, it ought to insist, even when the important concerns of the establishment clause are at stake, that such restrictions are required by the record in the case. Here, however, the record describes a carefully developed and administered program, well-grounded in the community and serving the educational needs of that community. Any constitutional attack on that

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Apparently, the Court of Appeals majority decision was prompted in part by its own policy priorities, including a perceived need to protect public education from the hypothesized expansion of private education. (40a). As demonstrated above, the stable school enrollment figures of the Grand Rapids community simply do not provide any basis for that hypothesis. More importantly, it is hardly the role of the establishment clause—or of the judiciary—to serve as a vehicle for enhancing one educational choice over another. *Cf., Pierce v. Society of Sisters.*

program must deal with the reality embodied in that record and not with hypothetical fears and conjecture. Constitutional invalidation of state programs ought not be "premised upon unfounded assumptions about how people live." *United States v. Kras*, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting).

III.

THE MAJORITY RULING BELOW SHOULD BE REVERSED BECAUSE OF ITS FAILURE TO LIMIT RESPONDENTS' TAXPAYER STANDING SOLELY TO CHALLENGES OF LEGISLATIVE APPROPRIATIONS AS REQUIRED BY THIS COURT'S DETERMINATIONS IN FLAST AND VALLEY FORGE.

Respondents' reliance on conjecture and a *per se* rule rather than on the actual record should not be surprising. They simply have suffered no personal injury as a result of these programs and therefore cannot even present " 'that *concrete* adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.' " *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (citing *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis supplied).

Respondents do not appear as parents of children involved in the challenged programs, nor do they assert any other particularized injury.[55] Their sole basis for standing to attack

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Respondents' allegation that the programs are "contrary to [their] religious consciences" (Complaint, ¶21, J.A. 7), amounting to no more than an assertion that plaintiffs "[suffer] in some indefinite way in common with people generally," *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), does not rise to the level of an Article III injury. *Valley Forge*, 454 U.S. at 485. A mere "religious difference," even on the part of a taxpayer, is an insufficient basis for Article III standing. *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952).

the programs of the GRPS is their status as citizens and taxpayers. In *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464 (1982), this Court revisited its earlier holdings dealing with taxpayer standing. It emphasized that, unless anchored in the basic requirement that the plaintiff demonstrate "'some actual or threatened injury,'" *Id.* at 472 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)), taxpayer standing could easily transform the federal court into "a forum in which to air . . . generalized grievances about the conduct of government." *Valley Forge*, 454 U.S. at 479 (citing *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). Consequently, a litigant has standing *as a taxpayer* not to assert an "interest in the use of funds," but only to assert that, *as a taxpayer*, he is in "danger of suffering . . . [a] particular concrete injury," *United States v. Richardson*, 418 U.S. 166, 177 (1974), "by virtue of his liability for taxes." *Valley Forge*, 454 U.S. at 478. For such "taxpayer injury" to exist, the prospective litigant must demonstrate that he is alleging an unconstitutional exercise of the congressional power under the taxing and spending clause of the federal constitution or its state analogue and further allege that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power. *Flast v. Cohen*, 392 U.S. 83 (1968).

Like the plaintiffs in *Richardson* and *Valley Forge*, the respondents fail to meet the first requirement. The action they challenge is not an exercise of the taxing and spending power by the Michigan legislature but a decision by local authorities to implement the programs at issue by the use of the funds made available by the state legislature. The applicable Michigan statutes do not require that such programs be initiated by local authorities. Nor do they expressly address the question as to whether the programs may be carried out in classrooms leased from nonpublic schools. (70a-73a) (J.A.

152-159). Both decisions are made at the local level. Yet the program is entirely funded by state appropriations.

Respondents would fare no better were they to characterize themselves as local, rather than state, taxpayers. First of all, such a characterization is inappropriate. Dr. Vruggink, the Deputy Superintendent, testified without refutation:

> THE COURT: Well witness, I think what I want to know is whether or not the shared time program and community education program is costing the taxpayer and the Grand Rapids School District any money?
>
> THE WITNESS: The answer is no.
>
> Q. (Mr. Dilley) You are getting all the money to finance that from state aid?
>
> A. Yes.

(Record, vol. VB, at 948). Accordingly, plaintiffs' taxpayer standing must be that of state, not local, taxpayers.

Even assuming *arguendo* that local taxpayer status is appropriate, the respondents were not injured by the state-funded program. Indeed, as local taxpayers, the respondents benefited under the Michigan school funding structure since the local school district actually received more state funds for every part-time public school child than was necessary to conduct the programs at issue. (74a n.6) (J.A. (¶238) 354). The difference eased the overall burden on the local taxpayer. Cf. *Valley Forge*, 454 U.S. at 480 n.17.

Respondents' complaint presents, therefore, precisely the kind of situation which this Court's constraints on taxpayer standing were designed to avoid. Like the plaintiffs in *Frothingham*, *Richardson* and *Valley Forge*, the respondents

simply express disagreement with how the government is managing its assets. They assert only "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485. They have not alleged any cognizable injury to them *as taxpayers*. They simply seek "a special license to roam in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487 (footnote omitted).

CONCLUSION

In our interdependent democratic society, we all have an interest in the secular education of each other. This interest is effectuated by the states and their local school districts within our flexible federal system. The GRPS have devised local programs to meet local needs within the framework of state law. These local secular educational innovations should not be prohibited by a *per se* application of the establishment clause. Here, the respondents have not shown that the programs violated any aspect of the three-part *Lemon* test or the underlying policy concerns of the establishment clause. Thus, this Court should sustain the supplemental child benefit programs as constitutionally permissible.

Thirty percent of the school age children in the Grand Rapids community attend nonpublic schools. The establishment clause should not render these students constitutional "outsiders" ineligible for discrete, supplemental, secular educational assistance by public school authorities. The significance of these educational benefits is exemplified by the poignant trial testimony of a mother of two children (who received remedial reading instruction through the Shared Time program), when she stated:

> Q. Without this kind of skill, your two sons would not have been able to learn as well as they are now learning, would they?
>
> A. Right. And not only learning, but their whole self esteem was involved with this. If you could see the difference between the first year of first grade with my oldest son and the second year of first grade, there is just remarkable improvement. He was, his who[le] nature has come out. He's much more happy, much more adjusted. *I hate to think what would have happened to him, if he had not had this extra help.*

(Record, vol. VIIIB, at 1392-1393) (emphasis supplied). Petitioners, by this appeal, seek this Court's approval to once again provide these benefits to all educationally needy and gifted students in the Grand Rapids community.

For the foregoing reasons, the petitioners respectfully request a reversal of the decision of the United States Court of Appeals for the Sixth Circuit.

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